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Cobalt Coal Corp. Mining, Inc. and United Mine Workers of America, AFL-CIO. Cases 09-CA-092229, 09-CA-095354, and 09-CA-096073

December 18, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On May 24, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 123. At the time of the Decision and Order, the composition of the National Labor Relations Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On June 22, 2018, the General Counsel filed a motion seeking to vacate the Board's May 24, 2013 Decision and Order, and upon de novo review of the General Counsel's motion for default judgment, to reissue the Decision and Order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we grant the General Counsel's motion to vacate the Board's May 24, 2013 Decision and Order. We shall now consider de novo the General Counsel's Motion for Default Judgment.

The General Counsel seeks a default judgment in this case on the ground that Cobalt Coal Corp. Mining, Inc. (the Respondent) has failed to file an answer to the order consolidating cases, consolidated complaint, compliance specification and notice of hearing (consolidated complaint and compliance specification). Upon a charge and first and second amended charges filed by United Mine Workers of America, AFL-CIO (the Union) in Case 09-CA-092229, on October 29 and December 7, 2012, and January 29, 2013, respectively; a charge and amended charge filed in Case 09-CA-095354, on December 20, 2012, and January 29, 2013, respectively; and a charge filed in Case 09-CA-096073, on January 9, 2013; the General Counsel issued the consolidated complaint and

compliance specification, on February 25, 2013, against the Respondent. The Respondent failed to file an answer.

On April 3, 2013, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on April 4, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the consolidated complaint and compliance specification affirmatively stated that unless an answer was received by March 11, 2013, the Board may find, pursuant to a motion for default judgment, that the allegations in the consolidated complaint and compliance specification are true.¹ Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated March 19, 2013, notified the Respondent that unless an answer was received by March 25, 2013, a motion for default judgment would be filed. On March 26, 2013, the Respondent, by its owner and president Michael Crowder, sent an e-mail letter to the Region stating that it was insolvent and unable to afford counsel or file an answer. By letter dated March 28, 2013, the Region informed the Respondent that legal counsel was not required to file an answer, and encouraged the Respondent to file an answer. The Respondent did not reply to that letter or file an answer.

Although the Board has shown some leniency toward respondents who proceed without the benefit of counsel, the Board has consistently held that pro se status alone does not establish a good cause explanation for failing to file an answer. See, e.g., *Patrician Assisted Living Facility*, 339 NLRB 1153, 1153 (2003); *Sage Professional Painting Co.*, 338 NLRB 1068, 1068 (2003). Here, the Respondent never filed an answer and it offered no good cause explanation for its failure to do so, despite being reminded that its answer was due and told that counsel was not necessary to file an answer.²

¹ Although the answer to the compliance specification was not due as of this March 11 deadline, the Region subsequently provided the Respondent with the required time to file an answer to the compliance specification, as well as a further extension.

² The consolidated complaint and compliance specification indicates that the Respondent ceased operations on November 7, 2012. It is also well established that a respondent's cessation of operations does not excuse it from filing an answer to a complaint or a compliance specification. See, e.g., *OK Toilet & Towel Supply, Inc.*, 339 NLRB 1100, 1100-

Accordingly, in the absence of good cause being shown for the failure to file an answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times since about March 8, 2010, at which time the Respondent commenced its operations, and continuing to date, the Respondent has been a corporation with an office in Premier, West Virginia, and has been engaged in the mining of coal at its facility in Hensley, West Virginia.

In conducting its operations during the 12-month period ending November 7, 2012, the Respondent sold and shipped from its Hensley, West Virginia facility goods valued in excess of \$50,000 directly to Alpha Natural Resources, Inc., which operates a coal preparation plant located in the State of West Virginia, and is an enterprise directly engaged in interstate commerce that shipped goods valued in excess of \$50,000 directly to points located outside the State of West Virginia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Daniel Smith	-	Superintendent
JC Woolridge	-	Out-by Foreman
Clayton Van Roberts	-	Mine Foreman

The Respondent engaged in the following conduct:

1. About September 24, 2012, the Respondent, by JC Woolridge, at its Hensley, West Virginia facility:

(a) By telling an employee that the Respondent knew what the employees were doing about the Union, created an impression among the Respondent's employees that their union activities were under surveillance by the Respondent.

(b) Interrogated an employee about the employee's union activities.

2. About October 15, 2012, the Respondent, by Daniel Smith, at its Hensley, West Virginia facility:

(a) By telling an employee that he knew which employees were the leaders of the Union, created an impression among its employees that their union activities were under surveillance by the Respondent.

(b) Interrogated an employee about which employees signed union authorization cards.

3. About October 25, 2012, the Respondent, by JC Woolridge, at its Hensley, West Virginia facility, interrogated an employee about employees' involvement in a petition supporting the Union.

4. About October 25, 2012, the Respondent, by Daniel Smith, at its Hensley, West Virginia facility, interrogated an employee about which employees were attempting to form a union.

5. About November 1, 2012, the Respondent, by Daniel Smith, at its Hensley, West Virginia facility:

(a) Threatened an employee that the Respondent would shut down the mine if employees voted in the Union.

(b) Interrogated an employee about whether the employee signed a union card.

6. About November 7, 2012, the Respondent, by Daniel Smith, at its Hensley, West Virginia facility:

(a) Interrogated an employee about how the employee voted in the election.

(b) Interrogated employees about who voted for the Union during the election.

(c) By telling employees that the Respondent knew which employees did not vote for the Union, created an impression among its employees that their union activities were under surveillance by the Respondent.

(d) Told employees that they were being sent home prior to the completion of their work shift because the employees voted in favor of the Union.

7. About November 7, 2012, the Respondent, by Clayton Van Roberts, at its Hensley, West Virginia facility, interrogated an employee about how the employees voted in the election.

8. Starting about October 22, 2012, the Respondent refused to recall and/or assign work to its employee Johnny Simms.

9. About November 7, 2012, the Respondent sent home the following employees prior to the completion of their work shift:

(i)	Eddie Branch
(ii)	Bruce Blankenship
(iii)	William Mullins
(iv)	Fred Coleman
(v)	Danny Smith

1101 (2003); *Dong-A Daily North America*, 332 NLRB 15, 15-16 (2000); *Holt Plastering, Inc.*, 317 NLRB 451, 451 (1995) (respondent was not excused from filing an answer to compliance specification, even

though the respondent notified the Board it had "ceased operations and liquidated the plant facilities").

10. The Respondent engaged in the conduct described in paragraphs 8 and 9 because the named employees of the Respondent formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

1. By the conduct described in paragraphs 1 through 7, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. By the conduct described in paragraphs 8 through 10, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by refusing to recall and/or assign work to an employee and by sending employees home prior to the completion of their work shift because the employees formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, we shall order the Respondent to make whole Johnny Simms, Bruce Blankenship, Eddie Branch, Fred Coleman, William Mullins, and Danny Smith for any loss of earnings and other benefits suffered as a result of its discrimination against them by paying them the amounts set forth in the compliance specification, with interest accrued to the date of payment, as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), and minus tax withholdings required by Federal and State laws.³

Additionally, we shall order the Respondent to compensate Simms, Blankenship, Branch, Coleman, Mullins, and Smith for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 9 allocating the backpay

award to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent shall also be required to remove from its files any reference to the unlawful refusal to recall and/or assign work to Simms and the unlawful sending home of Blankenship, Branch, Coleman, Mullins, and Smith prior to the completion of their work shift, and to notify them in writing that this has been done and that the refusal to recall and/or assign work and sending home prior to the completion of their work shift will not be used against them in any way.

Finally, in view of the fact that the Respondent ceased operations on November 7, 2012, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees who were employed at any time since September 24, 2012, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Cobalt Coal Corp. Mining, Inc., Premier and Hensley, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(b) Coercively interrogating employees about their or their coworkers' union activities, sympathies, or support.

(c) Threatening employees with closure of the mine if they select the Union as their collective-bargaining representative.

(d) Telling employees that they are being sent home prior to the completion of their work shift because the employees selected the Union as their collective-bargaining representative.

(e) Refusing to recall and/or assign work to employees because the employees formed, joined, or assisted the Union, or engaged in protected concerted activities, and to discourage employees from engaging in these activities.

(f) Sending home employees prior to the completion of their work shift because the employees formed, joined, or assisted the Union, or engaged in protected concerted activities, and to discourage employees from engaging in these activities.

³ As to the Respondent's claim that it is insolvent, the Respondent's financial resources have no bearing on the question of the calculation of gross backpay due to the discriminatees. What is relevant now is the amount due, not the Respondent's ability to pay. See *Scotch & Sirloin*

Restaurant, 287 NLRB 1318, 1320 (1988). Therefore, the Respondent's financial situation is not a basis for denying the General Counsel's motion. See *E.L.C. Electric*, 348 NLRB 301, 302 fn. 6 (2006).

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, by paying them the amounts opposite their names, plus interest accrued to the date of payment and minus tax withholdings required by Federal and State laws, as set forth in the remedy section of this Decision:

Johnny Simms	\$ 1600
Bruce Blankenship	\$ 120
Eddie Branch	\$ 130
Fred Coleman	\$ 104
William Mullins	\$ 100
Danny Smith	\$ 130
TOTAL BACKPAY:	\$ 2184

(b) Compensate Simms, Blankenship, Branch, Coleman, Mullins, and Smith for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days from the date of this Order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to recall and/or assign work to Simms and the unlawful sending home of Blankenship, Branch, Coleman, Mullins, and Smith prior to the completion of their work shift, and within 3 days thereafter, notify them in writing that this has been done and that the refusal to recall and/or assign work and sending home prior to the completion of their work shift will not be used against them in any way.

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"⁴ to the Union and to all employees who were employed by the Respondent at any time since September 24, 2012. In addition to physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 18, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT create the impression among our employees that your union activities are under surveillance.

WE WILL NOT interrogate you about your or your coworkers' union activities, sympathies, or support.

WE WILL NOT threaten you with closure of the mine if you select the Union as your collective-bargaining representative.

WE WILL NOT tell you that you are being sent home prior to the completion of your work shift because you selected the Union as your collective-bargaining representative.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the

WE WILL NOT refuse to recall and/or assign work to you because you formed, joined, or assisted the Union, or engaged in protected concerted activities.

WE WILL NOT send you home prior to the completion of your work shift because you formed, joined, or assisted the Union, or engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make whole employees Johnny Simms, Bruce Blankenship, Eddie Branch, Fred Coleman, William Mullins, and Danny Smith for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, paying them the amounts set forth in the Board's Order, plus interest.

WE WILL compensate employees Johnny Simms, Bruce Blankenship, Eddie Branch, Fred Coleman, William Mullins, and Danny Smith for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date of the Board's Order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to recall and/or assign work to Johnny Simms and the unlawful sending home of Bruce Blankenship, Eddie

Branch, Fred Coleman, William Mullins, and Danny Smith prior to the completion of their work shift, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to recall and/or assign work and sending them home prior to the completion of their work shift will not be used against them in any way.

COBALT COAL CORP. MINING, INC.

The Board's decision can be found at <http://www.nlr.gov/case/09-CA-092229> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

